Eastern Pequot Tribal Nation

TESTIMONY BEFORE THE BUREAU OF INDIAN AFFAIRS
ON JULY 31, 2013
BY THE EASTERN PEQUOT TRIBAL NATION

My name is Sheri M. Jones and this is Katherine Sebastian Dring and we are Tribal Councilors of the Eastern Pequot Tribal Nation. We welcome you to the Northeast. We would like to thank the Department of Interior and the federally recognized tribes present for allowing us to participate in the forum. We greatly appreciate your clear interest and concern for the Native Nations who have been adversely impacted by overly complex acknowledgment regulations which result in arbitrary denials of federal recognition.

The Eastern Pequot Tribal Nation is one of the nations that can trace its roots back to first contact with non-Indians. We have continuously occupied our reservation in North Stonington, Connecticut since it was first established in 1683 by the Colony of Connecticut. Our reservation is one of the oldest Native American reservations in the country. We have maintained a consistent and constant government to government relationship with the State of Connecticut and the United States. We also share both a 'backyard' and history with the two federally recognized tribes in the state – the Mashantucket Pequot Tribe and the Mohegan Tribe.

We petitioned for Federal Acknowledgement in 1978 to become eligible for federal housing, education and healthcare programs for our members. Our petition for federal acknowledgement was pending for more than two decades through various regulatory and administrative changes. The State of Connecticut and the surrounding towns also did everything they could to delay and thwart our recognition efforts. While we had to seek funding from investors, the State used taxpayer dollars to fight us.

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Finally, in March 2000 Kevin Gover, then Assistant Secretary-Indian Affairs, issued a preliminary positive for Federal Acknowledgement of the Eastern Pequots under the Clinton Administration. In July 2002 Assistant Secretary Neal McCaleb issued a positive final determination acknowledging the Eastern Pequots under the Bush Administration. We were deemed to have met all seven criteria's and were federally recognized.

However, in September 2002 the Connecticut Attorney General and surrounding towns continued to fight us, they appealed our positive final decision by filing a request for reconsideration to the Interior Board of Indian Appeals (IBIA). In May 2005, the IBIA issued a stunning decision that vacated our final positive decision and remanded the final determination for reconsideration. In October 2005, Associate Deputy Secretary James Cason, without allowing the Nation to respond to the IBIA ruling, issued an unprecedented Reconsidered Final Determination that reversed our positive federal acknowledgment decision. The Eastern Pequot Tribal Nation is the only tribe in the BIA's history to have its federal recognition stripped away after receiving two positive decisions.

We believe that the draft regulations are a major step in the right direction to simplify the acknowledgment process and reduce the amount of time and money required to get a final decision. We particularly applaud your decision to recognize the importance of historical reservations and to allow tribes to have expedited decisions if they maintain a state recognized reservation. Reservations, whether federally or state recognized, that existed throughout the 1900's served as a home base and gave tribes an important tool to thwart the assimilation and detribalization policies of the mid 1900's.

The present federal acknowledgment regulations turned the federal government's once simple process of recognizing tribal government into an overly burdensome process. The process requires tribes to wait years before being considered for recognition, forces tribes to borrow funding from many sources and incur great debt, allows political opposition to run rampant, and results in inconsistent decisions and some simply wrong headed decisions.

We are also concerned that the acknowledgment regulations have increasingly moved from Cohen's early statements of what constitutes a tribe.

There was no requirement that a tribe prove each element every 20 years or that the failure to prove one element should result in a

conclusion that a tribe could not be recognized. Rather, each of these elements could establish the existence of a tribe.

The draft regulations make some positive steps toward recapturing the original understanding of what constitutes a tribe.
With these general comments in mind, our specific recommendations include the following:

§83.1 Definitions. For clarity and to reflect the purpose of the reference to 1934, we recommend in the definition of "continuously or continuous," after the word "from", insert "date of the enactment of the Indian Reorganization Act of 1934". This reference to the IRA reflects the end of the allotment process and Congress' policy to continue to recognize tribes as sovereign governments.

We recommend also that the regulations establish a presumption that, if the Tribe existed in 1934, that the Tribe is still in existence presently.

History reflects that the government made it difficult for tribes to exist in 1934. Therefore, if a Tribe still existed in 1934, it is fair to assume that it still exists in modern times. Therefore, the burden should be placed on the government to prove termination rather than force Tribes to prove that they still exist.

We recommend deletion of the defined term "historically, historical or history" as the term, as presently defined, purports to require documentation from first sustained contact with non-Indians. This term places an unnecessary burden on tribes and is unnecessary.

We recommend deletion of the term "Office of Hearings and Appeals or OHA". We recommend against assigning decision-making to OHA.

Furthermore, we are unaware of any "Departmental Case Hearings Division" and are concerned that any such division would not have the requisite background and experience in Indian law, history and culture to take on acknowledgment cases.

§83.3(f). We are concerned that 83.3(f) and §83.10(r) suggest that the Assistant Secretary doesn't have authority to correct previous mistakes. The Assistant Secretary, however, can revisit and reconsider previous decisions under the acknowledgment regulations and should not restrict that broad authority.

The AS-IA may fully reconsider and revisit a decision not to recognize a tribe. Decisions made based on new, unexplained and unexplainable policies must be subject to reconsideration. The wisdom of a policy must

be reviewed in the context of the demands it places on tribes that seek recognition and should not be allowed to stop tribal nations from benefiting from a government-to-government relationship with the federal government. Therefore, we recommend that you clarify that the AS-IA may continue to reverse policy decisions and remedy clear mistakes of law and facts if required in the interest of justice for tribes.

Section 83.4 and other similar sections suggest that tribes that have already submitted documentation to the Department must resubmit that documentation. This is a major burden on tribes, especially tribes who have already submitted a fully documented petition and have received an adverse decision. Under the Paperwork Reduction Act, the Department is obliged to access its own records and not demand that tribes redevelop those extensive files. We estimate that it would take thousands of hours and hundreds of thousands of dollars to once again research and resubmit a fully documented petition. We recommend that the Department make each tribe's files easily available for each tribe and to devise a methodology for allowing the tribe to rely on existing Department files when appropriate.

Section 83.5 and similar sections appear to authorize the Office of Federal Acknowledgment (OFA) to make substantive recognition decisions. While we agree that there can be appropriate delegations to the OFA, the OFA should clearly serve as staff to the Assistant Secretary – Indian Affairs and should not usurp that authority.

We also strongly support the concept of an expedited favorable decision process referenced in §§83.6(c) and 83.10.

Section 83.6 purports to limit the number of pages of the documented petition. We agree that the petition as well as other documents submitted by other parties can be limited. For the petition, we recommend that the petition be limited to 50 pages, excluding exhibits.

With respect to §83.6(d), we agree that the evidence should be viewed in the light most favorable to petitioner. This standard is consistent with the long held legal standard that laws should be viewed in the light most favorable to the Indian tribe. We recommend that in this section, after a tribe has provided the basic information required for a petition, the burden of proof should shift to the Department and that the AS-IA must find only substantial evidence supports the validity of the facts claimed when viewed in the light most favorable to the petitioner.

We agree that subsection §83.7(a) should be deleted.

We recommend that subsection (b) should require a "substantial" portion of the petitioning group to comprise a distinct community and that an arbitrary percentage or predominant portion of the group is unnecessary.

Section 83.7(b)(2) should also require a substantial percent of marriages, members, etc. rather than a fixed percent.
Subsection 83.7(b) (1) and (2) should continue to include the terms "organization, or religious beliefs and practices" and add "systems or ceremonies".

Section 83.7(c) should include tribal leader interactions with other governments as evidence of political influence over the members. Tribal members allow their leaders to represent them before other governments to resolve issues with those governments. When a leader is sent by the membership to work with another tribal, state or federal government to represent the tribal government or to represent individual member's interests, such interactions evidence the person's influence over the membership. So to, the other government's reaction and dealings with the tribal leader evidences its finding that the leader can represent the tribe's membership. It is completely disingenuous to suggest that governments accept any Native American who appears before them as representative of the tribal government. Any government at least makes informal inquiries into whether that person can actually represent the tribe or its individual members. The federal government is not that cavalier in working with purported tribal leaders, neither are states or other tribes
The term historical should be deleted from subsection 83.7(e) and the phrase "from 1934" should be added at the end of the first sentence. We are concerned that the use of historical Indian tribe in (e) requires the same past document- intensive evidentiary requirement and defeats the other revisions which only relate back to 1934. The relevant times for identifying tribes and their membership is the 1900's, not since sustained contact.

We also recommend that the petitioner should only be required to identify a substantial number of petitioner's members as being descendants from a 1934 Indian tribe.

Section 83.8(b) combined with 83.10(b) authorizes the OFA to decide whether a tribe was previously federally acknowledged. We believe that all decisions should remain vested with the AS-IA who is charged with exercising the trust responsibility for tribes. Furthermore, we question whether delegations to the OFA are a cost effective approach for expediting the recognition decisions. If OFA is vested with decision-making, then the AS-IA would need additional staff to review those decisions. We do agree, however, that OFA should be delegated the

authority to provide technical assistance, publish notices, and take other such administrative actions that do not require AS-IA review.

We recommend that §83(c) (1) should be revised to add, at the end of (1), the phrase "whether or not such treaty was ratified." Subsection (2) should be revised to read as follows: "Evidence that the group has been denominated a tribe by act of Congress, actions by the Executive branch, or a Federal court decision."

We agree that a documented petition, under §83.9, should be the basis for beginning review of a tribe's petition and that the OFA should be delegated the authority to take the administrative actions required by §83.9.

Section 83.10 should include a requirement that all arguments and evidence submitted by other interested or informed parties shall be provided to the petitioner and that the petitioner shall be given an opportunity to review and respond to those submissions.

The OFA should have discretionary authority under subsection (e)(2) to suspend active consideration of a documented petition only after consultation with and the agreement of the petitioner.

To expedite reviews and decisions on recognition, we recommend that staff performance appraisals include a requirement that the staff meet designated internal deadlines. We understand that this approach improved land acquisition process.

We strongly support the concept in 83.10(g) of providing an expedited process for tribes that have maintained a reservation since 1934. There is no question that tribes that have had a reserve throughout the 1900's were in a unique position to maintain their identity despite the continued attempts to dissolve the tribes' government and culture.

We agree that §83.11 should be deleted.

Thank you for your time and your dedication to Indian tribes. Without you and others like you, the Eastern Pequot Tribal Nation would have little hope that it can achieve the recognition that it deserves.

If you have any questions, we stand ready to provide responses.